HOLIDAY INN KUALA LUMPUR

v.

NATIONAL UNION OF HOTEL, BAR & RESTAURANT WORKERS

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
WAN SULEIMAN SCJ
GEORGE SEAH SCJ
[CIVIL APPEAL NO. 184 OF 1984]
4 APRIL 1987

LABOUR LAW: *Industrial Court gave cognizance to Collective Agreement pursuant to s. 16 Industrial Relations Act 1967 - Collection of 10% service charge - 12% retained by Hotel and 88% of gross amount distributed to Hotel employees - Whether hotel under contractual obligation to pay service charge pursuant to Collective Agreement - Complaint under s. 56(1) of the Act.*

LABOUR LAW: *Function of Industrial Court in complaints under s. 56 of Industrial Relations Act - Enforcement of Award or Collective Agreement taken cognizance of by Court - Interpretation or adjudication of terms of Award or Collective Agreement - Whether within scope of s. 56 - Jurisdiction of Industrial Court - Whether acted without and/or in excess of Jurisdiction - Non-compliance of Collective Agreement is condition precedent to exercise of powers - Whether Hotel in breach or non-observance of term or terms of Collective Agreement.*

On 10 January 1981 the respondent (the Union) lodged a Complaint under s. 56(1) of the Industrial Relations Act 1967 to the Registrar of the Industrial Court alleging that the Hotel (the appellant) "has neglected to comply with the Collective Agreement taken cognizance of by the Industrial Court on 23 April 1980 (Cognizance No. 73/80)" in that the Hotel "Has not computed service charge of Article 26 for the ordinary and hourly rate of pay for Article 7 - Weekly Rest Day, Article 11 - Public Holiday and Article 8 - Overtime". The Hotel denied the allegations of the Union contained in the Complaint and averred that it was not under contractual obligation to pay service charge pursuant to the Collective Agreement. It further stated that the Collective Agreement did not include service charge for computing the ordinary rate of pay. Alternatively, the Hotel argued that the service charge is a variable allowance and as such denied the Union's claim of contractual right thereof as wages. The Industrial Court allowed the claim of the Union on 18 February 1981 and ordered the Hotel to pay arrears of (i) Rest Day pay, (ii) Public Holiday pay, and (iii) Overtime pay being the difference already paid and the amounts payable by virtue of this Award to all employees entitled thereto with effect from 1 October 1980 on or before 31 March 1981.

The Hotel was dissatisfied with this order and obtained leave from the High Court to apply for an order of *certiorari.* The High Court dismissed the notice of motion on the grounds, *inter alia,* that the Industrial Court acted within its jurisdiction when it made the order dated 18 February 1981. From this decision, the Hotel appealed to the then Federal Court.

Held:

[1] Section 56 of the Industrial Relations Act 1967 is concerned with the enforcement in a summary manner of an award made by the Industrial Court or of a Collective Agreement which has been taken cognizance of by the Court under s. 17 of the Act after a Complaint has been lodged as to its non-compliance with one or more terms of the award or said Collective Agreement. The non-compliance of a term of the award or Collective Agreement

must exist as an antecedent fact before the Industrial Court can exercise its powers contained in sub-section (2) thereof. It is, therefore, a condition precedent to the exercise of that powers that there should be in existence a breach or non-observance of a term of the award or Collective Agreement. This must be satisfactorily established by the complainant.

[2] Therefore in this case, it follows that when the complaint of the respondent under s. 56(1) of the Act was received, the first function of the Industrial Court was to inquire into and finally determine the question whether the respondent had brought its case within the terms that the Hotel had not complied with the Collective Agreement which had been taken cognizance of by the Industrial Court. If the Court had decided that the Hotel had not committed a breach of the term of the Collective Agreement then it should not proceed further in the matter. On the other hand, if the Court found that the Hotel had failed to comply with the terms of the Collective Agreement which formed the subject-matter of the complaint, then and only then could it exercise the statutory powers contained in sub-section (2) thereof.

[3] It was plain from the proceedings before the Industrial Court that the respondent had failed to establish that the Hotel had committed a breach or observe a term or terms of the Collective Agreement which has been taken cognizance of by the Court *vide* Cognizance No. 73/80.

[4] Since the respondent had failed to bring its case within the terms of s. 56(1) of the Act and since proof of non-compliance of the Collective Agreement is a condition precedent to the exercise of the powers contained in sub-section (2) of s. 56 thereof, the Court was constrained to hold that the order of the Industrial Court dated 18 February 1981 was made without and/or in excess of jurisdiction. As the Industrial Court had acted without and/or in excess of jurisdiction the learned Judge of the High Court should have granted an order of *certiorari* to set it aside. For the above reasons, the appeal was allowed with costs and the order of the Industrial Court dated 18 February 1981 quashed.

[Appeal allowed with costs. Costs to be taxed. Deposit to be refunded to appellant]

Cases referred to:

R. v. Income Tax Commissioners [1888] 21 QBD 313
R. v. Nat Bell Liquors Ltd. [1922] 2 AC 128
Inchcape Malaysia Holdings Bhd. v. R.B. Gray & Anor. [1985] CLJ (Rep) 132
National Union of Hotel, Bar & Restaurant Workers v. Casuarina Beach Hotel Sdn. Bhd. [1986] 2 MLJ 17
Federal Hotel Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers [1983] CLJ (Rep) 150; [1983] 1 MLJ 175
Peter Anthony Pereira & Anor. v. Hotel Jayapuri Bhd. & Anor. [1987] CLJ (Rep) 12

Legislation referred to:

Employment Ordinance 1955, s. 60I(1)
Industrial Relations Act 1967, ss. 2, 16, 17, 18, 20, 22, 26, 33, 56(1), (2)

For the appellant - V.T. Nathan; M/s. Shearn Delamore & Co.
For the respondent - T. Thomas; M/s. Skrine & Co.

JUDGMENT

George Seah SCJ:

The factual background, so far as directly material to this appeal, may be briefly stated.

On 16 January 1980 the Holiday Inn Kuala Lumpur (hereinafter referred to as the Hotel) and the National Union of Hotel, Bar & Restaurant Workers (hereinafter referred to as the Union) on behalf of the employees of the Hotel who are members of the Union entered into a

Collective Agreement in respect of the period from 1 November 1978 to 31 October 1981. On 23 April 1980 the Industrial Court gave cognizance to the Collective Agreement pursuant to s. 16 of the Industrial Relations Act 1967 (hereinafter referred to as the Act). The Collective Agreement *inter alia*, provides for the collection of a 10% service charge on bills and receipts specified in the Service Tax Act 1975. The Hotel retains 12% and the remaining 88% of the gross amount collected is distributed to employees of the Hotel in accordance with a scheme of distribution set out in the Collective Agreement.

On 10 January 1981 the Union lodged a complaint under s. 56(1) of the Act to the Registrar of Industrial Court alleging that the Hotel

> has neglected to comply with the Collective Agreement taken cognizance of by the Industrial Court on 23 April 1980 (Cognizance No. 73/80)" in that the Hotel "has not computed service charge of Article 26 for the ordinary and hourly rate of pay for Article 7 - Weekly Rest Day, Article 11 -Public Holiday and Article 8-Overtime.

The Hotel denied the allegations of the Union contained in the Complaint and averred that it was not under contractual obligation to pay service charge pursuant to the Collective Agreement. It further stated that the Collective Agreement did not include service charge for computing the ordinary rate of pay. Alternatively, the Hotel argued that the service charge is a variable allowance and as such denied the Union's claim of contractual right thereof as wages.

The Industrial Court allowed the claim of the Union on 18 February 1981 and said:

> In interpreting a Collective Agreement which has been taken cognizance of by the Court under the provisions of the Act (as is the case with the agreement here) regard must be had to the provisions of the Employment Ordinance 1955 (the Ordinance); see Industrial Court Awards Nos. 157 and 158 of 1980. In both Awards, we discussed in detail the effect of s. 601(1) of the Ordinance (as amended on 1 October 1980) *vis-a-vis* collective agreement on overtime and other rates of pay. We do not propose to repeat ourselves here. All we need say is that the formula for the calculation of **ordinary rate of pay** under the agreement is inferior to that laid down by law. The law must, therefore, prevail: s. 7 of the Ordinance. In any event, Article 3 of the agreement reads:
>
> (a) In the event that any legislation is introduced which is less favourable than those in the Agreement, then the benefits in the Agreement shall continue to remain in force.
>
> (b) If the benefits in the legislation are more favourable than those in the Agreement, then the provisions of the legislation shall supersede the benefits in the Agreement.
>
> We hold that a share of the service charge is part of remuneration of the Hotel employee as defined in wages in s. 2 of the Ordinance and as that section does not specifically exclude service charge it is wages within the meaning of ordinary rate of pay under s. 60I(1) of the Ordinance. We accordingly hold that for the purpose of calculating Rest Day pay, Public Holiday pay and Overtime, ordinary rate of pay includes the share of the service charge payable to the employees of the Company.
>
> In the event, we Order the Company to pay arrears of-
>
> (i) Rest Day pay,
> (ii) Public Holiday pay, and
> (iii) Overtime pay
>
> being the difference already paid and the amounts payable by virtue of this Award to all employees entitled thereto with effect from 1 October 1980 on or before 31 March 1981.

The Hotel was dissatisfied with this Order and obtained leave from a Judge to apply for an order of *certiorari*. The High Court dismissed the Notice of Motion on the grounds, *inter alia,* that the Industrial Court acted within its jurisdiction when it made the Order dated 18 February 1981.

From this decision the Hotel appealed to the then Federal Court. The relevant parts of s. 56 of the Act read as follows:

> 56.(1) Any Complaint that any term of any award or of any Collective Agreement which has been taken cognizance of by the Court has not been complied with may be lodged with the Court in writing by any trade union or person bound by such award or agreement.
>
> (2) The Court may, upon receipt of the complaint
>
> (a) make an order directing any party:
>
> (i) to comply with any term of the award or collective agreement; or
>
> (ii) to cease or desist from doing any act in contravention of any term of the award or collective agreement;
>
> (b) make such order as it deems fit to make proper rectification or restitution for any contravention of any term of such award or collective agreement; or
>
> (c) make such order as it considers desirable to vary or set aside upon special circumstances any term of the award or collective agreement.

As Lord Esher points out in *R. v. Income Tax Commissioners* [1888] 21 QBD 313 at p. 319, that if a statute says that a tribunal shall have jurisdiction if certain facts exist, the tribunal has jurisdiction to inquire into the existence of these facts as well as into the questions to be heard; but while its decision is final, if jurisdiction is established, the decision that its jurisdiction is established is open to examination on *certiorari* by a superior Court. The passage was cited by Lord Summner in *R. v. Nat Bell Liquors Ltd.* [1922] 2 AC 128 at p. 158, and applied by the Supreme Court in the case of *Inchcape Malaysia Holdings Bhd. v. R.B. Gray & Anor*. [1985] CLJ (Rep) 132. Tan Sri Mohamed Azmi SCJ explains the matter further in *National Union of Hotel, Bar & Restaurant Workers v. Casuarina Beach Hotel Sdn. Bhd.* [1986] 2 MLJ 17 at p. 20, in these words:

> In proceedings before the Industrial Court a dispute on jurisdiction can occur at two stages. In a complaint under s. 56(1) or a reference under s. 20 or s. 26, a jurisdictional error can occur at the initial stage affecting the complaint or reference itself; and the second occurrence can take place at the final stage affecting the "award" which by virtue of s. 2 definition includes any decision or order made by the Court under the Act. In *Enesty Sdn. Bhd. v. Transport Workers Union & Anor.* [1986] 1 MLJ 18 this Court has referred to the first jurisdictional dispute as "jurisdiction in the narrow and original sense" as distinguished from "jurisdiction in the wider sense." The former is jurisdiction to enter on an inquiry and the latter is jurisdiction to hear the complaint or reference on its merits...

Now, s. 56 is concerned with the enforcement in a summary manner of an award made by the Industrial Court or of a Collective Agreement which has been taken cognizance of by the Court under s. 17 after a complaint has been lodged as to its non-compliance. The non-compliance of a term of the award or Collective Agreement must exist as an antecedent fact before the Industrial Court can exercise its powers contained in sub-section (2) thereof. It is therefore, a condition precedent to the exercise of that powers that there should be in existence a breach or non observance of a term of the award or Collective Agreement. This must be satisfactorily established by the complainant.

Applying this to the facts of this case, it follows that when the complaint of the Union under s. 56(1) of the Act was received, the first function of the Industrial Court was to inquire into and finally determine the question whether the Union had brought its case within the terms that the Hotel had not complied with the Collective Agreement which had been taken cognizance of by the Industrial Court. If the Court had decided that the Hotel had not committed a breach of the term of the Collective Agreement then it should not proceed further in the matter. On the other hand, if the Court found that the Hotel had failed to comply with the term of the Collective Agreement which formed the subject-matter of the complaint, then and only then could it exercise the statutory powers contained in sub-section (2) thereof.

Instead of confining itself to the preliminary issue the Industrial Court in this case, proceeded to interpret and adjudicate the Union's complaint that "service charge" should be included in the computation of "ordinary rate of pay" for purposes of (i) weekly rest day pay, (ii) public holiday pay and (iii) overtime pay and purported to make an order under s. 56(2) of the Act directing the Hotel to pay the arrears on or before 31 March 1981. When the matter was brought before the High Court the learned Judge in dismissing the notice of motion for an order of *certiorari* to set aside the order of the Industrial Court dated 18 February 1981 said:

> When the Industrial Court hears a complaint lodged to it under s. 56 of the Industrial Relations Act, it is the function of the Industrial Court to interpret the Collective Agreement the subject of the complaint, and to interpret the law relevant to the matter. In the present case the award of the Industrial Court shows that when it made the finding and the order, it did so following its interpretation of the provisions of the collective agreement and of the relevant law. It did nothing more than the interpretation, and it is within its jurisdiction to interpret. It has not done anything which is outside its jurisdiction. It would fail in its duty if it did not interpret the provisions of the collective agreement and the relevant law. Its interpretation of the provisions of the collective agreement and of the law may be wrong, but there is nothing to show that it had made a wrong interpretation of the law relating to its jurisdiction. There is nothing to show that it has made any interpretation of any law relating to its jurisdiction. Even if its interpretation of the provisions of the collective agreement or of the law was wrong, such interpretation would be final and conclusive provided that such interpretation did not relate to the matter of its jurisdiction.

With respect this view of the law was rejected by the then Federal Court in the case of *Federal Hotel Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers* [1983] CLJ (Rep) 150. At p. 153 Abdoolcader J (as he then was) in giving the judgment of the Federal Court said:

> The learned Judge held that although s. 56 did not apply, s. 33(2) did as there appeared to be some uncertainty in regard to the implementation of the first award and that the Industrial Court therefore had jurisdiction although it purported to proceed under the wrong statutory provision. We must dissent. We cannot see how s. 33(2) can apply as it requires, in order to come into operation, an application by a party to an award to vary any of its terms whereupon the Industrial Court has power to accede thereto only in accordance with the specific provisions thereof.

In my judgment, under s. 56 of the Act the Industrial Court is charged with the enforcement of an award or Collective Agreement which has been taken cognizance of by the Court after a complaint has been received alleging non-compliance with one or more terms of the award or said collective agreement. On the authority of the *Federal Hotel* case *(supra)* the Industrial Court is not charged with the duty of interpreting or adjudicating the term or terms of an award or said Collective Agreement which are disputed by the contracting parties concerned.

Section 33 provides for this and the legislature has laid down certain procedure to be followed when a complaint is made pursuant to this section. The function of the Industrial Court under s. 33 can only be exercised on a definite application made for that purpose [see the *Federal Hotel* case *(supra)*]. In other words, any question of interpretation or adjudication of a term of an award or Collective Agreement is not within the scope of s. 56.

It was plain from the proceedings before the Industrial Court that the Union had failed to establish that the Hotel had committed a breach or observe a term or terms of the Collective Agreement which has been taken cognizance of by the Court *vide* Cognizance No. 73/80. I tend to agree with the submission of learned Counsel for the Hotel that the matter complained of was more in the nature of a demand by the Union for the inclusion of "service charge" in the computation of "ordinary rate of pay" for Weekly Rest Day pay, Public Holiday pay and Overtime pay when no such provision had been included in the Collective Agreement. As such, there was no question that the Hotel was guilty of non-compliance with a term or terms of the Collective Agreement. In *R. v. Nat Bell Liquors Ltd. (supra)* at p. 56 Lord Sumner said that supervision goes to two points: one is the area of the inferior jurisdiction and the qualification and conditions of its exercise. Since the Union had failed to bring its case within the terms of s. 56(1) of the Act and since proof of non-compliance of the Collective Agreement is a condition precedent to the exercise of the powers contained in sub-section (2) of s. 56 thereof, I am constrained to hold that the order of the Industrial Court dated 18 February 1981 was made without and/or in excess of jurisdiction. If authority is needed for this proposition reliance is placed on the then Federal Court case of *Federal Hotel Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers (supra)*. As the Industrial Court had acted without and/or in excess of jurisdiction the learned Judge should have granted an order of *certiorari* to set it aside. For the above reasons I allow the appeal with costs here and below to be taxed and quashed the order of the Industrial Court dated 18 February 1981. The deposit to be refunded to the appellant/Hotel.

As the order of the Industrial Court dated 18 February 1981 was set aside purely on the ground that it was made without and/or in excess of jurisdiction in the narrow and original sense, I express no opinion on the correctness or otherwise of the construction placed by the Industrial Court on the subject-matter of the dispute between the Union and the Hotel under the Collective Agreement taken cognizance of by the Industrial Court on 23 April 1980 *vide* Cognizance No.73/80.

Lee Hun Hoe CJ (Borneo):

I have the advantage of reading both the judgments of Wan Suleiman SCJ and that of Seah SCJ and I am inclined to agree with Seah SCJ.

The case involves, to borrow the words of Abdoolcader SCJ in *Dunlop Industries Employees Union v. Dunlop Malaysian Industries Bhd. & Anor*. Supreme Court Civil Appeal No. 481 of 1986, [1987] CLJ (Rep) 86, "the functional application by the Industrial Court of the provisions of s. 56" of the Industrial Relations Act 1967 (referred to as the Act). That case was concerned with failure to give proper notice relating to retrenchment under Article 42 of the collective agreement. The complaint was the non-compliance of Article 42 of the collective agreement. The complaint was not in dispute and the Industrial Court was seised with jurisdiction and could therefore make an order under s. 56(2)(b) of the Act.

In our case the Hotel disputed the complaint which was merely invoked to persuade the Industrial Court to interpret the Collective Agreement. In other words, the complaint was not actually about non-compliance of any term of the Collective Agreement which has been taken cognizance of by the Court but with the interpretation of the term of the Collective Agreement.

This is clear from what the learned Judge said in his judgment at p. 103:

> In the present case the award of the Industrial Court shows when it made the finding and the order, it did so following its interpretation of the provisions of the collective agreement and of the relevant law. It did nothing more than the interpretation, and it is within its jurisdiction to interpret. It has not done anything which is outside its jurisdiction.

Section 56 envisages a complaint of non-compliance of a term of a collective agreement. The Court should not allow a party to abuse the provisions of s. 56 when in reality that party is seeking interpretation of a term of a collective agreement. I agree entirely with Abdoolcader SCJ when, dealing with s. 56(1) of the Act, he said in *Federal Hotel Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers* [1983] 1 MLJ 175 & 177 at p. 177 that:

> ... there must be a complaint in the first instance as a prerequisite to the exercise by the Industrial Court of its power to make an order under any of the provisions of s. 56(2).

Section 2 of the Act defines a "trade dispute" to mean

> "any dispute between an employer and his workmen which is connected with the employment or non-employment or the term of employment or the conditions of work of any such workmen."

Where a trade dispute arises the parties may resort to s. 18 or s. 26 of the Act. If the complaint concerns the non-compliance of a term of a collective agreement which has been taken cognizance of by the Court then the aggrieved party may resort to s. 56 of the Act. However, if it is a matter of interpretation of an award or agreement the proper course would be to refer the matter to the Minister under s. 33 of the Act. It is then up to the Minister to decide whether to refer the question of interpretation to the Court. The significance of s. 33(5) becomes clear. It states that the Industrial Court for the purpose of s. 33 means the Court by which the award was made or any other Court specially constituted under s. 22 for the purpose. When the matter is referred to the Industrial Court under s. 33 the Industrial Court can only act under s. 33(2) and not under s. 56(2).

With respect, I agree with Seah SCJ that since the Hotel disputed the breach of the agreement the Court should decide whether the Hotel had indeed committed a breach of the term of the agreement. Only when the Court is satisfied that there is a breach that it can exercise its statutory power under s. 56(2). Otherwise an aggrieved party whose object is to seek interpretation of the collective agreement can indirectly invoke s. 56 by merely making a complaint of non-compliance of a term of a collective agreement thus bypassing s. 33. No doubt it will take time under s. 33 for the matter to reach the Industrial Court. But that is not a reason for bypassing s. 33 under the guise of a breach of a term of a collective agreement.

Accordingly, I would allow the appeal with costs here and the Court below. The order of the Industrial Court dated 18 February 1981 is set aside. The deposit is to be refunded to the appellant.

Wan Suleiman SCJ (dissenting)**:**

For the purpose of this judgment I need not set out the facts leading to this application under s. 56(1) of the Industrial Relations Act because such facts have been adequately set out in the judgment of the learned Judge in the Court below.

It would suffice to say that on 10 January 1981 the Union wrote to the Registrar of the Industrial Court to lodge a complaint under s. 56(1) of the Act to the effect that the Hotel had neglected to comply with the collective agreement in that it had not included service charge in the ordinary and hourly rate of pay under certain clauses, which were enumerated, of the collective agreement. The Industrial Court then proceeded to hear the complaint and on 18 February 1981 it made an award.

As one would expect the award involved, as it unavoidably should, interpretation of the various articles of the collective agreement.

The Hotel then applied by way of originating motion for an order of *certiorari* to quash that award on a number of grounds of which the relevant ones for the purpose of our decision are grounds(a) and (b) as set out below:

(a) The Industrial Court acted in excess of its jurisdiction and/or without jurisdiction in making an order that service charge was part of general remuneration and therefore to be included in the calculation of Rest Day Pay, Holiday Pay and Overtime Pay.

(b) The Industrial Court acted in excess of its jurisdiction and/or without jurisdiction in coming to the conclusion that ordinary rate of pay included the service charge payable to the employee.

For the Hotel it was submitted in the Court below that a breach of any term of the collective agreement alleged must be a breach of an **express** term of the collective agreement, and that the Industrial Court cannot purport to exercise jurisdiction under s. 56 by inferring or implying a breach by supplying words, phrases or sentences which the Industrial Court feels ought to have been included in the collective agreement. In short, what Counsel for the Hotel meant was that the jurisdiction of the Industrial Court is limited to the determining of the terms as alleged, and any ambiguity or uncertainty in the meaning of a term in a collective agreement must be dealt with under s. 33 of the Act.

Section 33 deals with the interpretation of any award or collective agreement and can either be set in motion by reference of the question to the Court by the Minister or by any party bound by the award on application to the Court.

Since that part of the learned Judge's grounds is vital for a proper understanding of his reason for agreeing with the decision of the Industrial Court, I too would set it out in full:

> When the Industrial Court hears a complaint lodged to it under s. 56 of the Industrial Relations Act, it is the function of the Industrial Court to interpret the collective agreement the subject of the complaint, and to interpret the law relevant to the matter. In the present case the award of the Industrial Court shows that when it made the finding and the order, it did so following its interpretation of the provisions of the collective agreement and of the relevant law. It did nothing more than the interpretation, and it is within its jurisdiction to interpret. It has not done anything which is outside its jurisdiction.

Having had the advantage of reading the majority judgment I must with great respect say that the Federal Court decision in *Federal Hotel Sdn. Bhd. v. National Union of Hotel, Bar & Restaurant Workers* [1983] CLJ (Rep) 150, does not reject such a view of the law.

The facts as set out in the headnote will make my conclusion obvious. The appeal there was against the dismissal of appellant's application for an order of *certiorari* to quash an award made by the Industrial Court on 20 January 1979. The Industrial Court made an award pertaining to a new collective agreement, which on computation a sum of RM400,000 was payable by the appellant as adjustments and arrears of wages on or before 30 November 1978. In view of the deadline imposed, financial hardship and cash flow problems, the appellant's solicitors wrote to the Industrial Court on 18 November 1978 proposing to effect payment by way of four instalments payable between 15 November 1978 and 15 May 1979.

The Industrial Court treated this letter as a written complaint lodged under s. 56(1) for non-compliance with the first award and summoned both the parties before it on 2 December 1978. A second award made on 20 January 1979 resulted in the appellant being liable for an additional sum of RM150,000. The Court also ordered the payment of RM200,000 by midnight

that very day and the balance on 20 February 1979. The High Court dismissed the appellant's application for *certiorari* to have the second award and all proceedings relating thereto quashed on the grounds that the Industrial Court had no jurisdiction.

It is only in this context that the Federal Court in allowing the appeal held that the Industrial Court had no power to assume jurisdiction in making the second award either under ss. 33(2) or 56 both of which it held did not apply.

Once a complaint is lodged under s. 56 that a term or terms of the collective agreement is not being complied with or if what was on the face of it such a complaint is in effect an application under s. 33(1) for interpretation of such terms of the award, then the Court is seised with the narrow jurisdiction referred to both in the *National Union of Hotel, Bar & Restaurant Workers v. Casuarina Beach Hotel Sdn. Bhd.* [1986] 2 MLJ 17, a decision of this Court, as well as in the earlier decision of *Inchcape Malaysia Holdings Bhd. v. R.B. Gray & Anor*. [1985] CLJ (Rep) 132. Having been seised with jurisdiction the Industrial Court then has a wider jurisdiction to examine the complaint on its merit and by virtue of s. 33B of the Industrial Relations Act, the Industrial Court having been properly seised with the narrow sort of jurisdiction mentioned in the first place (sometimes also called the threshold jurisdiction), the ouster clause then comes into effect, and accordingly its decision "shall not be challenged, appealed against, reviewed, quashed or called in question in any Court". This would be so even if it had made an error of law.

However I would, with respect say that the Industrial Court did not appear to have been in error of law. It had properly invoked Article 3 of the collective agreement in applying s. 60I(1) of the Employment Ordinance 1955 as embodying benefits in the law more favourable than those in the agreement in holding that ordinary rate of pay includes the service charge payable to employees of the company.

It would also be pertinent to note the Privy Council decision in *Peter Anthony Pereira & Anor. v. Hotel Jayapuri Bhd. & Anor.* [1987] CLJ (Rep) 12, (Privy Council Appeal No. 29 of 1984) where their Lordships held in allowing the appeal that Mr. Pereira's share of service charges is "wages" within the meaning of the Employees' Provident Fund Act 1951.

I would accordingly dismiss the appeal with costs.

Also found at [1988] 1 CLJ 133